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similar dilemmas as a result of different forms of personal injury. It is, therefore, to be welcomed that at the same time as proposing this legislation, the Scottish Ministers referred the general question of damages for wrongful death to the Scottish Law Commission, thus providing an opportunity for the law in this area to be rationalised.

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By the Book: Enrichment by Interference

*HarperCollins Publishers Ltd v Young*¹ is an example of a rarity: a case on corporeal moveables in the Court of Session.² The pursuer, the well-known publisher, operates a distribution centre in Glasgow. There it receives books returned from retailers. It pulps the paperbacks, but outsources the pulping of hardbacks and audio books to another company, Stirling Fibre Ltd. The pursuer averred that various of its products, which were wrapped in cellophane, had “gone missing”³ from the centre or in transit to that company. It further averred that the defender, during a five-year period, had listed for sale 14,083 products published by the pursuer on the internet site *ebay* and had sold 9,365. The defender was said to have made £61,351.57 from these sales. The pursuer averred that it had no commercial relationship with the defender and that the books that he marketed were those items which had gone missing. It sought a whole battery of remedies, including redelivery of the books and payment of the profit made by selling them. The case came before Lady Clark of Calton in the Outer House for a debate.

A. PROVING OWNERSHIP

The pursuer faced an uphill battle as to proving the books were its property. It averred that due to the scale of its operation at the distribution centre it was “not possible ... to ascertain exactly when or how the items went missing”.⁴ About 120 million books were distributed from there every year. The defender argued that there was no proper link between the books which had allegedly disappeared and those sold or held by the defender. The pursuer contended, however, that the low prices at which the defender marketed the goods made it impossible for him to have obtained them legitimately.

1 [2007] CSOH 65.

2 For another example, see *Boskabelle Ltd v Laird* [2006] CSOH 173, 2006 SLT 1079, discussed in D L Carey Miller, “Right to annual crops” (2007) 11 EdinLR 274.

3 [2007] CSOH 65 at para 4.

4 Para 7.

Also significant was the defender's description of the goods as "new" or "brand new" and the fact that they were in the manufacturer's cellophane wrapping.

Lady Clark was willing to accept the pursuer's argument: "I consider that, in theory at least, the pursuer is entitled to set out averments seeking to establish a controlled and limited market from which an inference might be drawn that the products of the pursuer sold by the defender and held by the defender were not sourced from any legitimate market and were products stolen as averred by the pursuer. I consider that is a matter which can only be resolved by proof".⁵ It seems to the present writer that when it comes to that proof, the pursuer will have the difficult task of rebutting the presumption that the possessor is owner.⁶ The defender will not need to establish that possession was acquired in good faith.⁷ It is questionable the extent to which the presumption can be rebutted by an inference. There is authority, however, that in an action for delivery it is sufficient to prove previous possession coupled with its loss in circumstances where there was not an intention to give up title, for example wrongful taking.⁸ It is not clear whether the inference mentioned by Lady Clark would be sufficient in this regard, but one can have sympathy with the pursuer's predicament given the scale of its operation.

B. ENRICHMENT BY INTERFERENCE

The pursuer also sought to show that the defender was in bad faith. To the uninitiated reader of the decision, the reason for this is unclear. It concerns an area of law which is nowhere to be found in the discussion of bad faith: unjustified enrichment.⁹ The law draws a distinction between cases where (a) a party has sold another's goods in the knowledge of the true position and (b) where such a sale is made in good faith. In the words of Sheriff Principal Robert Reid QC:¹⁰

There is inherent in the legal idea of ownership, a right on the part of the owner to demand his property from any person into whose hands it may come or to recover the value of the property from any possessor who has sold it knowing that he had not acquired a good title to it from his author. If the possessor has parted with the property in ignorance of a defect in the title of his author and without negligence he is liable to the owner quantum lucratus in recompense.

In relation to showing bad faith on the part of the defender, the pursuer once again faced a heavy challenge. Lady Clark commented that the case was unusual, because the pursuer was "not in a position to aver and prove theft of the pursuer's goods, except by inference."¹¹ The pursuer sought to rely on the defender's description of the goods

⁵ Para 10.

⁶ Stair, *Inst* 2.1.42.

⁷ *Chief Constable, Strathclyde Police v Sharp* 2002 SLT (Sh Ct) 95, discussed in D L Carey Miller, "Title to moveables: Mr Sharp's Porsche" (2003) 7 EdinLR 221.

⁸ K G C Reid, *The Law of Property in Scotland* (1996) para 531.

⁹ Strictly, however, in cases where property is handed away in bad faith and liability is for full value rather than *quantum lucratus*, it may be argued that the claim is for compensation and not enrichment.

¹⁰ *Merchandise Funds Co Ltd v Maxwell* 1978 SLT (Sh Ct) 18 at 19.

¹¹ [2007] CSOH 65 at para 10.

as “new” or “brand new” as evidence of his bad faith. Lady Clark was not persuaded, suggesting that there required to be an advertising statement that the products had come direct from the pursuer, plus averments that the defender knew or should have known that he had no contract with the pursuer to distribute. She concluded that no relevant case of bad faith had been pled.

This left the pursuer with an enrichment claim based on profit made upon the sales, i.e. recovery on the basis of *quantum lucratus*. It has to be said that the texts relied on by the parties are peculiar. There is much institutional authority here. For example, Stair writes:¹²

the obligation of restitution is formally founded upon the having of things of others in our power, and therefore, that ceasing, the obligation also ceaseth. As he who *bona fide* did buy that which did belong to another, if while he hath it, it appeareth to be that other's, he must restore it . . . but if *bona fide* he has sold it before he be questioned, he is free, and not obliged to restore it; though insofar as he is profited in receiving more for it than he gave, he be liable by the obligation of remuneration or recompense.

Other institutional writers treat the subject too.¹³ They are not cited. Neither is the modern academic work which categorises A's profit on a sale in good faith of B's property as enrichment by interference.¹⁴ Instead, reliance is placed mainly on Walker on *Delict*¹⁵ and the *fourth* edition of Gloag and Henderson (1946),¹⁶ as well as relevant case law.

The point at issue between the parties was whether the profit on sale can be sought only if the property itself cannot be recovered. For if Alan sells Barbara's property to Carol and Barbara gets back the property from Carol as well as the profit made by Alan, there is “double recovery”. Reference was made to Carey Miller and Irvine's treatment of this subject in the context of a sale by a bad faith possessor.¹⁷ The position stated in the fourth edition of Gloag and Henderson is:¹⁸

when a *bona fide* purchaser of stolen products has resold them before receiving notice of the defect in his title, he is liable only for any profit he may have made on the resale, and then

¹² Stair, *Inst* 1.7.11.

¹³ Erskine, *Inst* 3.1.10; Bell, *Prin* § 527; Hume, *Lectures* III, 234.

¹⁴ N R Whitty, “Some trends and issues in Scots enrichment law” 1994 JR 127 at 131; K G C Reid, “Unjustified enrichment and property law” 1994 JR 167 at 193; A J M Steven, “Recompense for interference in Scots Law” 1996 JR 51 at 57-58; J Blackie, “Enrichment, wrongs and invasion of rights in Scots law” 1997 *Acta Juridica* 284 at 286-288; N R Whitty, “Rationality, nationality and the taxonomy of enrichment”, in D Johnston and R Zimmermann (eds), *Unjustified Enrichment: Key Issues in Comparative Perspective* (2002) 658 at 705-708; J Blackie and I Farlam, “Enrichment by act of the party enriched”, in R Zimmermann, D Visser and K Reid (eds), *Mixed Legal Systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) 469 at 495-496; H L MacQueen, *Unjustified Enrichment* (2004) 43-44; M Hogg, *Obligations*, 2nd edn (2006) paras 4-72-4.79.

¹⁵ D M Walker, *The Law of Delict in Scotland*, 2nd edn (1981) 1006.

¹⁶ W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, 4th edn, by A D Gibb and N M L Walker (1946) 125.

¹⁷ D Carey Miller with D Irvine, *Corporeal Moveables in Scots Law*, 2nd edn (2005) 239-243, referring to Scottish Law Commission, Consultative Memorandum on *Corporeal Moveables: Remedies* (Scot Law Com CM No 31, 1976).

¹⁸ See n 16.

only in the event of the products being irrecoverable.

This edition was cited by the defender because it was relied on by the sheriff in *Bunten v Silverdale*,¹⁹ decided a few years later. The pursuer noted that the passage did not survive in later editions. As a matter of interest, it appeared in the first edition (1927)²⁰ and was still there in the ninth edition (1987).²¹ But the tenth edition (1995)²² saw its removal and replacement with a passage which also appears in the current edition (2001)²³ and which was cited by Lady Clark.²⁴ This passage does not require the goods to be irrecoverable for there to be a claim.

Lady Clark also considered the case law in addition to *Bunten*, in particular *Scot v Low*,²⁵ *Faulds v Townsend*²⁶ and *Jarvis v Manson*.²⁷ She concluded on the basis of these cases that a claim for unjustified enrichment based on *quantum lucratus* was not limited to the situation where it was impossible to obtain restoration of the property. While the defender had submitted that the policy outcome of such a conclusion was unwelcome, she was bound by settled law. She was also not convinced that the remedy which the defender had said should be used was “so obviously desirable”. It would require the pursuer “to seek the return of hundreds of individual products from individuals in different parts of the world at a time when the products were unlikely to be in “new condition””.²⁸ One can agree, but the possibility of double recovery is hardly desirable either.

Earlier, Lady Clark had expressed surprise that the policy issues had not been discussed more since the Scottish Law Commission looked at the subject in 1976.²⁹ The point is well taken though, in fact, they have been cogently examined by Professor

19 (1951) 67 Sh Ct Rep 62.

20 W M Gloag and R C Henderson, *Introduction to the Law of Scotland* (1927) 115.

21 W M Gloag and R C Henderson, *Introduction to the Law of Scotland*, 9th edn, by A B Wilkinson and W A Wilson (1987) para 14.2.

22 W M Gloag and R C Henderson, *The Law of Scotland*, 10th edn, by W A Wilson and A D M Forte (1995). This was the edition in which the chapter entitled “Quasi Contract” was replaced by one entitled “Unjustified Enrichment”. See also H L MacQueen, “Peter Birks and Scots enrichment law”, in A Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (2006) 401 at 401–402 and 416.

23 W M Gloag and R C Henderson, *The Law of Scotland*, 11th edn, by L J Dunlop et al (2001), para 28.11. In the 10th edn, it appears in para 29.11.

24 [2007] CSOH 65 at para 15.

25 (1704) Mor 9123.

26 (1861) 23 D 437.

27 1954 SLT (Sh Ct) 93. A modern case on the area not cited was *North-West Securities Ltd v Barrhead Coachworks Ltd* 1976 SC 38.

28 [2007] CSOH 65 at para 17.

29 She refers to Scottish Law Commission, Consultative Memorandum on *Corporeal Moveables – Passing of Risk and of Ownership* (Scot Law Com CM No 25, 1976); Scottish Law Commission, Consultative Memorandum on *Corporeal Moveables – Protection of the Onerous Bona Fide Acquirer of Another's Property* (Scot Law Com CM No 27, 1976); and to Scottish Law Commission, Consultative Memorandum on *Corporeal Moveables – Remedies* (Scot Law Com CM No 31, 1976). These were part of a wider project by the Commission led by Sir Thomas Smith. Most of it remains unimplemented: see K G C Reid, “While one hundred remain: T B Smith and the progress of Scots law”, in E Reid and D L Carey Miller (eds), *A Mixed Legal System in Transition: T B Smith and the Progress of Scots Law* (2005) 1 at 4–5.

Eric Clive in his *Draft Rules on Unjustified Enrichment*.³⁰ He proposes two new rules. First, a person claiming redress of any unjustified enrichment resulting from an interference with that person's patrimonial rights is to be treated for the purpose of any claims by or against third parties as having ratified that interference.³¹ Thus if Alan sells Barbara's property to Carol and Barbara claims the profit made by Alan, she is regarded as having ratified the sale. This means that she cannot seek restitution of the property from Carol. Barbara thus has a choice: pursue Alan or pursue Carol. Double recovery is not possible. In the circumstances of the *HarperCollins* case, pursuit of the profit is obviously the more attractive choice.

Professor Clive's second rule³² limits that choice to protect purchasers in good faith. Under current law, if Alan sells Barbara's property to Carol, who is in good faith, who then sells on to Derek, Barbara can recover any profit which Carol makes.³³ Professor Clive would remove this liability. He comments that "the prospect of ten or twelve intermediate purchasers who all acted in good faith being pursued for small profits by the owner of the goods (who might well recover the goods at a later date) is not appealing."³⁴ He further points out that the current law is inconsistent with the law on indirect enrichment in general and that in English law third party purchasers in good faith have a defence to a restitution claim. The defender in the *HarperCollins* case would not be advantaged by this rule unless he could have shown that he was a good faith purchaser. There is much to be said for Professor Clive's proposed rules here³⁵ and hopefully they will be carefully considered if Parliament eventually legislates in this area.

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The author would like to thank Professor Niall Whitty for his comments on an earlier draft.

30 E M Clive, *Draft Rules on Unjustified Enrichment*, published as a separate appendix to Scottish Law Commission, Discussion Paper on *Judicial Abolition of the Error of Law Rule and its Aftermath* (Scot Law Com DP No 99, 1996) rules 3(3), (4).

31 Rule 3(3). This is similar to one of the suggestions made in Scottish Law Commission, Consultative Memorandum on *Corporeal Moveables – Remedies* (n 29) para 10. Compare § 816 BGB, discussed in B S Markesinis, W Lorenz and G Dannemann, *The German Law of Obligations* vol 1 (1997) 748-749.

32 Rule 3(4).

33 Stair, *Inst* 1.7.11.

34 Commentary to rule 3(3).

35 A view shared by Blackie & Farlam (n 14) at 496.